

**OCCUPATIONAL SAFETY  
AND HEALTH STANDARDS BOARD**

2520 Venture Oaks, Suite 350  
Sacramento, CA 95833  
(916) 274-5721  
FAX (916) 274-5743  
[www.dir.ca.gov/oshsb](http://www.dir.ca.gov/oshsb)



**FINDING OF EMERGENCY  
GOVERNMENT CODE SECTION 11346.1  
OCCUPATIONAL SAFETY AND HEALTH STANDARDS BOARD  
PROPOSED EMERGENCY AMENDMENTS TO TITLE 8  
CALIFORNIA CODE OF REGULATIONS SECTION 5148**

The Occupational Safety and Health Standards Board (Standards Board) hereby finds that the proposed emergency amendment to Title 8 of the California Code of Regulations, as described in the Informative Digest below, constitutes an emergency regulation pursuant to Government Code Section 11346.1. This finding is based on a determination that there is a real and substantial risk of disease from exposure to tobacco smoke and that, as stated in Labor Code Section 6404.5, the regulation of smoking is of statewide importance. The proposed amendments are authorized by Labor Code Section 142.3 and, for the reasons stated here, are necessary for the continued and immediate preservation of public health and safety and general welfare.

Labor Code Section 6404.5 was enacted in 1994 and fully in effect by 1998. Subsection 6404.5(k) specifies that the Division of Occupational Safety and Health (the Division) is not required to respond to complaints regarding the smoking of tobacco products in enclosed spaces at places of employment unless the employer has been found guilty at the local level of three violations within the previous year. Pursuant to subsection (k), the Division has cited employers statewide from 1998 to 2003 for alleged violations of Labor Code Section 6404.5. On May 29, 2003, the Decision After Reconsideration of the Occupational Safety and Health Appeals Board (Appeals Board) in the matter of *Robert D. Schultz and James A. Noll (OSHAB 01-125)* held that the Division does not have authority to take action to enforce the provisions of Section 6404.5 in the absence of a regulation promulgated by the Standards Board. The proposed addition of new Section 5148 will address the Appeals Board decision and allow the Division to continue to regulate smoking statewide, consistent with Labor Code Section 6404.5.

Labor Code Section 6404.5(b) provides that

No employer shall knowingly or intentionally permit, and no person shall engage in, the smoking of tobacco products in an enclosed space at a place of employment.

Labor Code Section 6404.5(c) details "reasonable steps" that employers must take to ensure compliance with the provisions of Section 6404.5(b). Section 6404.5(c) also details particular actions that employers are not required to take as "reasonable steps" to prevent smoking by a nonemployee in the workplace. Labor Code Section 6404.5(d) details establishments with employees that are not included within the meaning of "place of employment" in Section 6404.5(b).

The proposed emergency amendment will enable the Division to immediately begin to fulfill the mandate of Labor Code Section 6309 to investigate employee complaints of unsafe working conditions with respect to smoking as envisioned by Section 6404.5(k).

#### INFORMATIVE DIGEST OF PROPOSED ACTION/POLICY STATEMENT OVERVIEW

Labor Code Section 6404.5 was enacted in 1994 to prohibit smoking in the workplace and became fully in effect by 1998. There are currently no counterpart regulations in Title 8 that implement the statewide prohibition of smoking in the workplace. Labor Code Section 6404.5(k) specifies that the Division is not required to respond to complaints regarding the smoking of tobacco products in enclosed spaces at places of employment unless the employer has been found guilty at the local level of three violations within the previous year. The Division has cited employers statewide from 1998 to 2003 for alleged violations of Labor Code Section 6404.5. In the matter of *Robert D. Schultz and James A. Noll (OSHAB 01-125)* issued May 29, 2003, the Appeals Board decided that the Division does not have authority to enforce the provisions of Section 6404.5 absent a regulation promulgated by the Standards Board. The proposed addition of new Section 5148 will address the Appeals Board decision and will clarify for all affected employers that the Division is authorized to enforce the provisions of Labor Code Section 6404.5.

The Division has initiated this rulemaking in response to the Decision After Reconsideration of the Occupational Safety and Health Appeals Board in the matter of *Robert D. Schultz and James A. Noll (OSHAB 01-125)*. The proposed amendments to Section 5148 would adopt verbatim the statewide enforceable provisions of Labor Code Section 6404.5. Labor Code Section 6404.5(b) provides that no employer shall knowingly or intentionally permit, and no person shall engage in, the smoking of tobacco products in an enclosed space at a place of employment. Labor Code Section 6404.5(c) details “reasonable steps” that employers must take to ensure compliance with the provisions of section 6404.5(b). Section 6404.5(c) also details particular actions that employers are not required to take as “reasonable steps” to prevent smoking by a nonemployee in the workplace.

The proposed amendments to Section 5148 refer to the provisions of Labor Code Section 6404.5(d) with regard to establishments with employees that are not included within the meaning of “place of employment” and so would not be subject to the provisions of Section 5148. Subsection (d) is not reprinted in Section 5148 due to its length and can easily be referred to by the regulated public in the Labor Code. Other parts of Labor Code Section 6404.5 were not reprinted in Title 8 since they apply only to local enforcement of the law and not the enforceable sections used by the Division.

There is no comparable federal standard with regard to prohibiting smoking in the workplace.

### DOCUMENTS RELIED UPON

Decision After Reconsideration of the Occupational Safety and Health Appeals Board in the matter of *Robert D. Schultz and James A. Noll (OSHAB 01-125)*.

This document is available for review Monday through Friday from 8:00 am to 4:30 pm at the Standards Board office located at 2520 Venture Oaks Way, Suite 350, Sacramento California.

### STRIKEOUT/UNDERLINE DRAFT PROPOSAL

See Attachment No. 1.

### SIDE-BY-SIDE CODE COMPARISON WITH FEDERAL STANDARDS

This proposal is not covered by federal standards or enforcement; therefore, a side-by-side code comparison is not included.

### COST ESTIMATES OF PROPOSED ACTION

#### Costs or Savings to State Agencies

No costs or savings to state agencies are anticipated to result as a consequence of the proposed action.

#### Costs or Savings in Federal Funding to the State

The proposal will not result in costs or savings in federal funding to the state.

#### Costs or Savings to Local Agencies or School Districts Required to be Reimbursed

No costs to local agencies or school districts are required to be reimbursed. See explanation under "Determination of Mandate."

#### Other Nondiscretionary Costs or Savings Imposed on Local Agencies

This proposal is not anticipated to impose nondiscretionary costs or savings on local agencies.

### DETERMINATION OF MANDATE

The Occupational Safety and Health Standards Board has determined that the proposed regulation does not impose a local mandate. Therefore, reimbursement by the state is not required pursuant to

Part 7 (commencing with Section 17500) of Division 4 of the Government Code because this regulation does not constitute a “new program or higher level of service of an existing program within the meaning of Section 6 of Article XIII B of the California Constitution.”

The California Supreme Court has established that a “program” within the meaning of Section 6 of Article XIII B of the California Constitution is one which carries out the governmental function of providing services to the public, or which, to implement a state policy, imposes unique requirements on local governments and does not apply generally to all residents and entities in the state. (County of Los Angeles v. State of California (1987) 43 Cal.3d 46.)

The proposed regulation does not require local agencies to carry out the governmental function of providing services to the public. Rather, the regulation requires local agencies to take certain steps to ensure the safety and health of their own employees only. Moreover, the proposed regulation does not in any way require local agencies to administer the California Occupational Safety and Health program. (See City of Anaheim v. State of California (1987) 189 Cal.App.3d 1478.)

The proposed regulation does not impose unique requirements on local governments. All state, local and private employers will be required to comply with the prescribed standard.

Attachment